

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER 01-0342
RESPONSIBLE OFFICER
SALES TAX and WITHHOLDING TAX
For Tax Periods: December, 1995-April, 1996**

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Issues

1. Sales and Withholding Tax -Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-3-4-8 (f), IC 6-8.1-5-1 (b), Indiana Department of Revenue v. Safayan, 654 N.E. 2nd 270 (Ind.1995), Ball vs. Indiana Department of Revenue, 563 NE2d 522(Ind. 1990).

The taxpayer protests the assessment of responsible officer liability for unpaid corporate sales and withholding taxes.

2. Sales and Use Tax-Best Information Available Assessments

Authority: IC 6-8.1-5-4 (a), IC 6-8.1-5-4 (c), IC 6-8.1-5-1 (a), IC 6-2.5-5-8.

The taxpayer protests the amount of the sales tax assessment.

3. Tax Administration-Interest and Penalty

The taxpayer protests the imposition of interest and penalty.

Statement of Facts

The taxpayer was secretary and a shareholder of a corporation that did not remit the proper amount of sales and withholding taxes to Indiana. The taxpayer was personally assessed for the taxes, penalties and interest. The taxpayer protested these assessments. Pursuant to the request of the taxpayer, the issue was determined based upon the contents of the file. More facts will be provided as necessary.

1. Sales and Withholding Tax-Responsible Officer Liability

Discussion

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 that provides as follows:

An individual who:

(1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and

(2) has a duty to remit state gross retail or use taxes to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

The proposed withholding taxes were assessed against the taxpayer pursuant to IC 6-3-4-8(f), which provides that “In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest.”

Indiana Department of Revenue assessments are prima facie evidence that the taxes are owed by the Taxpayer who has the burden of proving that assessment is incorrect. IC 6-8.1-5-1 (b).

The issue to be determined in this case is whether or not the taxpayer was a person who was responsible for remitting the corporate trust taxes to the Indiana Department of Revenue.

The seminal case considering the personal liability of officers for corporate withholding and sales taxes is Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995). In that case, four investors started a restaurant. One couple, the Safayans, provided most of the capital for the restaurant. The other couple provided the knowledge and experience in the restaurant business. The Safayans delegated the day to day operations of the restaurant to the second couple. After withholding and sales taxes were not properly remitted to the state of Indiana, the Indiana Department of Revenue assessed those taxes, penalty and interest against Mrs. Safayan in her capacity as president of the corporation. The Indiana Supreme Court upheld the assessment.

The taxpayer was the secretary of the corporation at the time of its incorporation and throughout the life of the corporation. As secretary, the taxpayer is part of the board of directors, which makes the ultimate decisions concerning the operations of the corporation. The taxpayer indicated that he and the other board members delegated the day to day financial duties to the corporate controller. As a member of the board of directors and the secretary, the taxpayer had the responsibility to oversee that the corporation employees fulfilled the financial responsibilities of a corporation including remitting trust taxes to the Indiana Department of Revenue. Mrs. Safayan also argued that responsibility for day to day duties was delegated to another person. The Court specifically found that her delegation of the daily responsibilities did not absolve her

of liability. The law does not require, however, that only one person be considered the person with a duty to remit taxes to the state. In the Safayan case, the corporate president was held to be a responsible person even though the day to day operations were specifically delegated to a vice-president in her employment contract as manager. “A party may be liable for trust taxes without having exclusive control over the corporation’s funds.” Safayan at 274. Another person’s possible responsibility for the remittance of taxes does not absolve the taxpayer from responsible officer liability.

Previously the Indiana Department of Revenue personally assessed the corporate trust taxes against the corporation’s president. After a hearing, it was determined that the president did not personally owe the taxes because he had resigned from the presidency of the corporation prior to the tax period for which the trust taxes were not properly remitted to the state. The Letter of Findings did not consider whether or not the president would have been an officer responsible for the remittance of trust taxes if he had been president during the tax period. If he was not an officer or employee during the subject tax period, then he could not be held responsible for those trust taxes. The taxpayer agrees that he was an officer throughout the tax period during which the unpaid trust taxes accrued. That substantial difference distinguishes the two cases. The taxpayer can be held personally responsible for the payment of the corporate trust taxes.

The taxpayer also contends that the doctrine of laches bars the Department’s ability to assess the taxpayer as a responsible officer in this situation. The Indiana Supreme Court held in Ball vs. Indiana Department of Revenue, 563 NE2d 522(Ind. 1990), at page 522 that laches would apply if the Department acted “in an unusually dilatory manner.” Pursuant to IC 6-8.1-5-1 (b), The taxpayer carries the burden of proving that the Department is incorrect. The taxpayer presented no evidence that the Department acted in an unusually dilatory manner in this case. Therefore laches does not bar the assessment against Taxpayer.

Finally, the taxpayer alleges that others were actually responsible for the remittance of taxes. The law does not require, however, that only one person be considered the person with a duty to remit taxes to the state. In the Safayan case, the corporate president was held to be a responsible person even though the day to day operations were specifically delegated to a vice-president in his employment contract as manager. “A party may be liable for trust taxes without having exclusive control over the corporation’s funds.” Safayan at 274. Another officer’s possible responsibility for the remittance of taxes does not absolve the taxpayer from responsible officer liability.

Finding

The taxpayer’s first point of protest is denied.

2. Sales and Use Tax-Best Information Available Assessments

Discussion

The taxpayer also protests the amount of the sales tax personally assessed against him. The Indiana Department of Revenue prepared the assessments based upon the best information available, previous returns filed by the corporation. Taxpayers are required to retain books and records "so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC 6-8.1-5-4 (a). Taxpayers also have a duty to present these records to authorized agents of the department in response to reasonable requests. IC 6-8.1-5-4 (c). If a taxpayer does not present adequate records for a department auditor to determine the proper tax liability, the department auditor should make a determination of the proper amount of tax liability based upon the best information available. IC 6-8.1-5-1 (a).

The taxpayer presented actual sales tax returns that he had prepared based on a recent review of the corporate records. The corporation was winding down its business during the audit period. The taxpayer presented evidence that the majority of cars sold were exempt from sales tax because they were sold to other dealers who would resell the automobiles. IC 6-2.5-5-8. The returns also include the tax collected on automobiles, parts and other items sold at retail by the corporation. The taxpayer sustained his burden of proving that the tax assessment was incorrect.

Finding

The taxpayer's second point of protest is sustained subject to review.

3. Tax Administration-Interest and Penalty

Discussion

The taxpayer protests the imposition of interest pursuant to IC 6-8.1-10-1. That statute, however, also specifically states that "the department may not waive the interest imposed under this section." Therefore, the interest assessment cannot be waived in this case.

The taxpayer also protests the imposition of penalty. The statutes prescribing the personal liability of officers specifically state that the corporate penalties are passed through to the responsible officers. Therefore the taxpayer owes any penalty properly imposed against the corporation. IC 6-2.5-9-3, IC 6-3-4-8(f).

The Department assessed a twenty percent (20%) penalty on the sales tax assessments and a ten per cent (10%) penalty on the withholding tax assessments.

The twenty per cent (20%) penalty was imposed on the sales tax liabilities pursuant to IC 6-8.1-10-4(b) as follows:

If the department prepares a person's return under this section, the person is subject to a penalty of twenty per cent (20%) of the unpaid tax.

In this case, the Department prepared the original returns to determine the assessment. To contest the best information available assessment, the taxpayer belatedly submitted completed returns. Therefore, the twenty per cent (20%) penalty is no longer appropriate.

The ten per cent (10%) penalty on the withholding tax assessment was assessed pursuant to IC 6-8.1-10-2.1-(a) (3) that provides for the imposition of a penalty if there is a deficiency due to negligence on the part of the taxpayer.

Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to reach and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

In this case, the corporation had a duty to remit the collected sales and withholding taxes to the state of Indiana. It breached this duty and did not remit the trust taxes. Therefore the corporation negligently did not pay the taxes and the negligence penalty properly applies.

Finding

The taxpayer's protest is sustained in part and denied in part. The negligence penalty applies to both the sales and withholding taxes.